STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL HOWARD KEITH,

Defendant-Appellant.

UNPUBLISHED
November 2, 1999

No. 210992
Berrien Circuit Court
LC No. 96-004164

Before: Bandstra, C.J., and Markman and Meter, JJ.

PER CURIAM.

Defendant Samuel Howard Keith appeals as of right his jury conviction of felonious assault, MCL 750.82; MSA 28.277, for which he was sentenced to serve a prison term of 2½ to eight years. We affirm.

On appeal, defendant argues that he was denied his right to a fair trial because the trial court, through its comments, created an atmosphere conducive to hasty deliberations. We disagree. Initially, we note that defendant did not object to the remarks of the trial judge. Normally, in the absence of an objection at trial, an appellate court will review an assertion that the defendant was denied a fair trial because of misconduct of the trial court only if manifest injustice would result from a failure to review the issue. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Review is appropriate, even in the absence of objection below, where the error resulted in the denial of a fair trial. *People v Collier*, 168 Mich App 687, 697; 425 NW2d 118 (1988). Such review without the benefit of an objection at the trial court level has been described as "particularly appropriate" in cases where any objection would have needed to be made to the trial judge himself regarding his own conduct. *Id*., quoting *People v Roby*, 38 Mich App 387, 389; 196 NW2d 346 (1972).

Claims of coerced verdicts are reviewed case by case, and all the facts and circumstances, as well as the particular language used by the trial court, must be considered to determine whether the defendant was denied a fair trial. *People v Vettese*, 195 Mich App 235, 244; 489 NW2d 514 (1992). Defendant bases his challenge on two comments made by the court in the presence of the jury. At the end of the first day of trial, the trial judge made the following comments while addressing the jury:

> Now, we anticipated, as we indicated earlier, that this would take two days, that we would be done Tuesday. We're moving along a little slower than we had hoped, so we'll sort of play it by ear tomorrow. A couple of things could happen. One is that *we would go over to*

Wednesday which I want to avoid because I have other things already planned and I know some of you have some things planned as well.

The other thing that — that is a possibility is, is that we could finish with the case and instruct you — well, let's finish the case in the morning or early afternoon and instruct you and — have the closing arguments and then the jury instructions and it would be in the latter half of the afternoon that *you would be beginning your deliberations* and in that event, *it may be that we'll all just want to stay until you conclude your deliberations which may be six o'clock* rather than come back for a short time on — on Wednesday morning. I'm just trying to give you a feel for what — what may happen tomorrow. We don't know — exactly know how this is going to go. This way you can make arrangements, you know, talk to your family, whatever you need to do, about these — these possibilities that may occur. [Emphasis added.]

In addition, the court made these further comments during the prosecutor's closing rebuttal argument:

[PROSECUTOR]: Ladies and gentlemen, I'll try to be brief. Sometimes I think lawyers try to take up as much time in the hopes that they'll put you to sleep and you won't care any more [sic] about the outcome or about deliberating about a case that is important to the People.

And I get the impression that [defense counsel] would — would like to tell you how to decide this case factually and how to apply the law. But he can't do that. That is your function as jurors and I hope — I know you're tired and I'll try to be brief. But I hope that you have not — not allowed him to invade your province. That's your function. And you are fully capable of doing that without being told how to do it, how to apply it and what the facts are. You've heard the facts for yourself.

[DEFENSE COUNSEL]: Your Honor, I object to the form of the argument because it invites the jury to disregard the law.

THE COURT: As I said before, the Court will instruct the jury on the law *if we ever get done with the arguments*. [Emphasis added.]

From these remarks, defendant alleges that the trial judge created an atmosphere conducive to hasty deliberations and deprived him of his right to a fair trial by an impartial jury. US Const, Ams V, VI, XIV; Const 1963, art 1, §§ 17, 20. In support of this contention, defendant cites *People v Malone*, 180 Mich App 347; 447 NW2d 157 (1989). However, the instant case is factually dissimilar from *Malone*. In *Malone*, this Court found that the trial court had effectively coerced a verdict from the jury when, after a full day of deliberations, it failed to make clear that the jury would be able to return the following morning if it was unable to reach a verdict shortly after dinner, and emphasized that the court would be disappointed if the jury was unable to reach a verdict. In reaching its conclusion, this Court stated:

> While we do not believe that the trial court was attempting to coerce a verdict, we are constrained to agree with defendant that the effect of the trial court's comments to the jury may have been a coerced verdict. In light of the fact that the jury was *never* told that it could resume deliberations on the following [day], we believe that the trial court's comments, taken as a whole, at best were confusing and may have improperly communicated by implication that, if a verdict could not be reached that evening, the jury would be considered deadlocked and would be permanently discharged. [*Id*. at 353; emphasis added.]

Unlike the trial judge in *Malone*, the trial judge in the instant case noted that if deliberations on the second day were unsuccessful, the jurors would have to return the following morning to recommence their discussions. There was nothing in the comments offered by the trial judge to indicate that if a verdict was not reached that evening, the case would be permanently removed from the jury's consideration. Furthermore, the mere fact that

the court indicated that if the jurors failed to reach a verdict by six o'clock that evening, they would possibly be excused and required to return the following morning was not coercive. See *Vettese*, *supra* at 245.

Defendant also argues that the case of *People v London*, 40 Mich App 124; 198 NW2d 723 (1972), requires that his conviction be reversed. In *London*, this Court held that the trial court created an atmosphere that seemingly required a hasty verdict where the court sent the jurors, who had already been on duty nearly fourteen hours, out to deliberate for the first time at 10:55 p.m. under a threat that they would remain until 4:00 a.m. if that were necessary to obtain a verdict. The jury returned within eighteen minutes with a verdict of guilty. Again, the factual dissimilarities of *London* are such that application to the instant case is not warranted. Although, arguably, the comments made by the trial judge in the instant case "might better have been omitted," his actions were not so egregious as those found in *London*. *People v Sullivan*, 392 Mich 324, 331; 220 NW2d 441 (1974), quoting *People v Kasem*, 230 Mich 278, 289; 203 NW 135 (1925).

Moreover, in the instant case, the judge informed the jurors, among other things, that they should listen to the viewpoints and opinions of each other, and that although they should try to reach an agreement, they should not give up their honest opinions simply for the sake of reaching an agreement. The court did not tell the jurors that it was their duty to agree upon a verdict or tell an individual juror that he must give up his own views and agree with the majority. Rather, the jurors were instructed that the verdict must be the individual verdict of each juror and be the result of his own convictions. The judge's statements to the jury, together with the all the facts and circumstances, were not coercive. *Vettese, supra* at 244. It cannot be said that the comments now complained of by defendant prejudiced his right to a fair trial.

As a final consideration, this Court notes that in addition to the comments already discussed, defendant argues that certain comments made by the trial judge regarding his frustration with the unanticipated length of the trial contributed to a hasty verdict requiring reversal of his conviction. However, as defendant himself acknowledges, these comments were made during a conversation with the attorneys outside the presence of the jury. Any contention that these comments had a coercive effect on the jury is without merit.

We affirm.

/s/ Richard A. Bandstra
/s/ Stephen J. Markman
/s/ Patrick M. Meter